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In The

# Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF MISSISSIPPI, ST. JAMES CHURCH, AND JERRY MCBRIDE,

*Petitioners,*

v.

JULIE MABUS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Hinds County Circuit Court Of Mississippi, First Judicial District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a civil suit against a member of the clergy, and the religious organization of which he is a member, for not following ecclesiastical laws and canons, outside the subject-matter jurisdiction of the civil courts and barred because of the Religion Clauses of the First Amendment?

2. Is the imposition of a special duty by a civil court on a member of the clergy and/or religious organization, based solely on religious status or affiliation, a violation of the Religion Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

## LIST OF PARTIES

In the proceedings below, Respondent named the Episcopal Diocese of Mississippi, Inc. as a party to the action. The proper name and title of this Petitioner is the Protestant Episcopal Church in the Diocese of Mississippi. Respondent also named St. James Episcopal Church as a party to the action. The proper name of this Petitioner is St. James Church. The only other parties to the proceeding in the court below not named in this Petition are John Does 1-10.

## CORPORATE DISCLOSURE STATEMENT

The boundaries of the Protestant Episcopal Church in the Diocese of Mississippi ("Diocese") are co-extensive with the boundaries of the State of Mississippi. The Diocese is an ecclesiastical body that is operated exclusively for religious purposes. It is not incorporated; instead, it is an affiliated diocese and institution that is a subordinate unit of, and in canonical union with, the Protestant Episcopal Church in the United States of America.

St. James Church is a Mississippi, non-profit corporation. St. James Church is not a publically held corporation and has no parent corporation.

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## PETITION FOR WRIT OF CERTIORARI

The Protestant Episcopal Church in the Diocese of Mississippi, St. James Church, and Jerry McBride respectfully submit this Petition for a Writ of Certiorari to review the order of the Circuit Court of Hinds County, Mississippi, First Judicial District in this case.

## OPINIONS BELOW

The orders of the Mississippi Supreme Court (App. at 7-11) and the Circuit Court of Hinds County, Mississippi, First Judicial District (App. at 1-6) are unreported and do not contain opinions. The dissenting justices of the Mississippi Supreme Court issued a separate, unreported statement on the initial denial of the interlocutory appeal. (App. at 8-10)

## JURISDICTION

The Hinds County Circuit Court of Mississippi, First Judicial District, denied Petitioners' Motion to Dismiss on August 15, 2001 and entered an order to that effect on August 27, 2001. (App. at 1) Petitioners sought interlocutory appeal from the Mississippi Supreme Court asserting the violation of their First Amendment and Fourteenth Amendment rights that would exist if Respondent's lawsuit continued. The Mississippi Supreme Court, in a four to four ruling, entered its Order denying Petitioners' Petition for Interlocutory Appeal on November 29, 2001, (App. at 7) and entered its Order denying reconsideration

of that Order on January 7, 2002. (App. at 11) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. (App. at 13)

Section one of the Fourteenth Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. (App. at 13)

## STATEMENT OF PERTINENT FACTS, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Respondent Julie Mabus (hereinafter referred to as "Ms. Mabus") has filed suit against Petitioners, her priest, Jerry McBride (individually hereinafter referred to as "the Priest"), her church, Saint James Church (individually hereinafter referred to as "the Church"), and the Protestant Episcopal Church in the Diocese of Mississippi (individually hereinafter referred to as "the Diocese") alleging claims for breach of fiduciary duty, fraudulent concealment, negligent misrepresentation, negligent infliction of emotional distress, and clergy malpractice against the Priest and vicarious liability for these claims against the Church and the Diocese. (App. at 14) She also alleges direct claims against the Church and the Diocese for negligent retention/supervision and clergy malpractice. All of these claims are based on the allegation that the Priest failed to inform Ms. Mabus that her then husband, former Mississippi Governor Ray Mabus, had told the Priest he was going confront Ms. Mabus with some marital difficulties and tape the conversation with Ms. Mabus. Mr. Mabus invited the Priest to be present when the conversation occurred. Mr. Mabus recorded the conversation without Ms. Mabus' knowledge. Ms. Mabus alleges that during a subsequent divorce proceeding, Mr. Mabus' expert psychologist used the transcript of that conversation as part of his basis to form his opinion as to who should receive custody of their two children. (App. at 14)

There is no doubt Ms. Mabus bases her claims upon the religious status of Petitioners, and that it is Ms. Mabus' intent to have a civil court interpret the religious

doctrine and canons of the Episcopal church as a basis for liability. Ms. Mabus has stipulated in a court hearing that but for the religious status of Petitioners "there would be no case here."[1] Importantly, it is neither unlawful nor tortious under Mississippi law to record secretly a conversation without another's consent or to not disclose someone else is taping. *Attorney M. v. The Mississippi Bar*, 621 So. 2d 220 (Miss. 1992) (See also App. at 26). Furthermore, Ms. Mabus' Complaint in this matter is replete with allegations that the Priest owed Ms. Mabus, *as well as all of his other parishioners*, a special civil, legal duty of confidentiality and care *because of* his status as a priest and his ecclesiastical responsibilities,[2] while Ms. Mabus'

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[1] Quoting Ms. Mabus' counsel, "They've [(counsel for Petitioners)] suggested to the Court that if a neighbor or a friend had been at the meeting [instead of a priest] that there would be no case here. *We certainly agree with that.*" (App. at 26) (emphasis added).

[2] The following extracts of Ms. Mabus' Complaint are just a few examples to demonstrate that her Complaint is premised upon the assumption that one's ecclesiastical duties or religious affiliation creates special legal duties are as follows:

> 15. Father McBride's ***position as priest*** of St. James Episcopal Church ***placed him in a special relationship of trust and faith with his parishioners.***

(App. at 17) (Specifically alleging that it is the Priest's position as a priest that places a special legal duty upon him as toward **all of his parishioners.**)

> 36. Defendants St. James and Diocese knew or should have known that Father Jerry McBride ***could not be trusted to follow the Cannons of the Episcopal religion and maintain the confidence and/or trust of parishioners.***

Complaint contains no other factual basis that would give rise to a special duty of confidence or care.[3] In addition,

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(App. at 21) (Specifically alleging that it was the Priest's priestly duties that were breached.)

> 37. Despite Defendants' St. James and Diocese's knowledge, they failed to take appropriate steps to supervise Father McBride's ***interaction with parishioners and they continued to enable his service as the spiritual leader*** of St. James Episcopal Church.

(App. at 21) (Relying on the fact that the Priest was a spiritual leader during the alleged acts.)

> 40. Father McBride's acts in violating the trust and confidentiality ***of a parishioner*** by permitting surreptitious taping of a confidential counseling session by a third party and his failure to address the parishioner's distress resulting from ***the priest's betrayal violated the generally accepted standards of care adopted by clergy professionals and constituted clergy malpractice.***

(App. at 21-22) (Alleging a duty owed to parishioners, in general, as the basis for the Complaint, specifically stating that it is the Priest's position as a member of the clergy that was breached.)

[3] If Ms. Mabus' claims were not based purely upon these Petitioners' "status," Ms. Mabus has had ample opportunity to amend her Complaint to include additional facts upon which her claims are based. Furthermore, the state court could have dismissed this lawsuit without prejudicing Ms. Mabus, had Ms. Mabus merely drafted her Complaint erroneously, because Rule 15 of the Mississippi Rules of Civil Procedure provides, "On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), thirty days leave to amend shall be granted. . . . " Miss. R. Civ. Pro. R. 15. Moreover, Mississippi law requires a plaintiff to specifically plead the facts upon which a special fiduciary duty is based. *See Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1216

counsel for Ms. Mabus also has expressly represented that they intend to probe into these Petitioners' religious beliefs and the content of Petitioners' religious canons during discovery and the trial of this matter to define the appropriate standard of care for Episcopal priests.[4] Counsel for Ms. Mabus is currently pursuing the deposition of the Bishop and several other Episcopal priests for this very purpose. (App. at 28-30)

Petitioners moved to dismiss the suit in the Hinds Circuit Court of Mississippi, First Judicial District, asserting among other things, that the First Amendment bars a civil court from adjudicating the interpretation and application of religious doctrines and beliefs as well as the polity of religious organizations. Without an opinion, the circuit court denied the motion to dismiss and a request for reconsideration. (App. at 1-4)

Interlocutory review of the circuit court's order was sought from the Mississippi Supreme Court along with a

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(Miss. 1996). Since no other facts are pled that would give rise to a special fiduciary duty, there is no doubt that it is religious status alone upon which Ms. Mabus bases her claims.

[4] Quoting Ms. Mabus' counsel,

> [W]hether the conduct at issue in this case involves the interpretation of religious doctrine . . . we establish that by them calling their witnesses up there and saying, oh, whether or not to reveal the confidences of a confession, that's purely a church matter, and then we call experts that get up there, Episcopalian experts that understand and are familiar with their doctrines, and say, well, no actually, it's just the opposite. . . .

(App. at 26)

request for a stay of proceedings before the circuit court pending the appeal. In addition to the constitutional and other arguments, Petitioners also contended that to permit the court proceedings to go forward through discovery and a trial would unconstitutionally entangle the court in religious doctrine and polity for which Petitioners would have no ability to undo.

On November 29, 2001, the Mississippi Supreme Court handed down an evenly divided opinion. (App. at 7-10) Four justices voted to grant the relief requested, four justices voted to deny the requested relief, and one justice recused himself. The Mississippi rules require that a majority of justices vote for interlocutory relief for it to be granted; thus, the decision denied Petitioners' Petition for Interlocutory Appeal and Petition for Stay of Proceedings. No opinion accompanied the court's denial of the Petitions; however, the four justices in favor of granting the interlocutory appeal and petition for stay issued a Statement on Order (authored by Chief Justice Pittman of the Mississippi Supreme Court) stating, in part:

> It appears now that discovery, including the deposition of several priests and the bishop, is underway.
>
> . . .
>
> This is certainly not just another defendant. We should not open the Church and its priests and ministers to ordinary malpractice suits. *The order here entered allows the plaintiff to conduct discovery in regard to St. James Church activities, management and personnel, and further allows, without restraint, the plaintiff to employ discovery of the dioceses and its activities. No harm could come from*

> *allowing this Court to rule on the fundamental legal questions at this stage. Harm may result if the respondent is allowed to prowl the internal operations of this or any church in an action for which the law may ultimately be determined to offer no legal cause of action.* An interlocutory appeal should be granted to first determine Mississippi's law with regard to the questions raised and to avoid possible harmful unrestricted discovery and depositions of church life.

(App. at 9) (emphasis added). Petitioners sought discretionary reconsideration of the court's November 29, 2001 Order, which was also denied without opinion by Order dated January 7, 2002. (App. at 11) At this point, Petitioners have exhausted all avenues for relief in the court below.

For the reasons set forth herein, the denial of interlocutory review by the Mississippi Supreme Court was a final order reviewable by this court under 28 U.S.C. § 1257, in accordance with *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 479-83 (1975) (stating an order is final under 28 U.S.C. § 1259 even though further proceedings may take place in the lower court under circumstances where a federal issue can not be resolved at the end of the lower court proceedings without impairing federal rights).

## REASONS FOR GRANTING WRIT

### I. THE WRIT SHOULD BE GRANTED BECAUSE CIVIL COURTS ARE FORBIDDEN FROM ADJUDICATING WHETHER ECCLESIASTICAL LAWS AND POLICIES HAVE BEEN VIOLATED

The writ should be granted because this suit against Petitioners is a direct challenge to this Court's established

precedent holdings that civil courts may "exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them" because such would require "the civil courts . . . to inquire into . . . the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination." *Watson v. Jones*, 80 U.S. 679, 733 (1871); *see also Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (the First Amendment confers a "power [for religious bodies] to decide for themselves free from matters of church government, as well as those of faith and doctrine."); *Serbian Orthodox Diocese v. Milivojevich*, 469 U.S. 696, 709 (1976) (for "civil courts to analyze whether ecclesiastical actions are in accordance with 'canon or ecclesiastical law' is exactly the inquiry the First Amendment prohibits.").

Because the claims of Ms. Mabus are grounded on alleged violations of ecclesiastical laws and policies, and not on any violation of civil law, the First Amendment provides absolute immunity to liability. This immunity is effectually lost, however, if the Priest, the Church and the Diocese are subjected to the burdens of broad and reaching discovery into church doctrines and practices and a trial involving the same. *Id.; c.f. Mitchell v. Forsythe*, 472 U.S. 511, 524 (1985) (holding that immunity matters are treated as orders "appealable before final judgment" to avoid nullifying the immunity). As such, to protect Petitioners' basic constitutional rights, it is necessary that the Writ be granted at this time.

Moreover, the prohibition against civil courts interpreting religious doctrine applies, in order to avoid excessive entanglement of the state with religion, even if such is for a legitimate state interest. As an example, States have a legitimate, secular interest in seeing that disputes over property are peacefully resolved. Yet, in property dispute cases, this Court has held, that "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *see, e.g., Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). No such state interest exists in the case *sub judice*, yet Mississippi's encroachment on the doctrines and practices of the Church and the Diocese is far greater than that allowed in cases involving church property disputes. If the state can not interpret religious doctrine to resolve property disputes, then surely the state can not interpret religious doctrine to say whether a clergy person, a church or a diocese acted properly.

In sum, regardless of the ultimate outcome, litigation of their religious canons and practices violates Petitioners' religious freedoms. These violated rights can only be protected if this Court grants Petitioners' Writ at the present time.

## II. THE WRIT SHOULD BE GRANTED BECAUSE THE FIRST AMENDMENT PROHIBITS SINGLING OUT RELIGIOUS INSTITUTIONS AND CLERGY FOR SPECIAL CIVIL DUTIES BECAUSE OF THEIR RELIGIOUS STATUS

The Writ should also be granted because this Court has long held that special duties or burdens can not be placed on institutions or persons because of religious status. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down Tennessee law prohibiting a member of the clergy from holding elected office). As stated by this Court in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1984),

> [R]eligious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens *simply because of their religious affiliations* or commitments, for such a disability would violate the right to religious free exercise, which the First Amendment guarantees as certainly as it bars any establishment.

*Id.* (emphasis added); *see, e.g., McDaniel*, 435 U.S. 618. "[A] law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *see, e.g., Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953); *McDaniel*, 435 U.S. at 626 (plurality opinion). In this case, it is stipulated that there is no legal prohibition against non-clergy persons doing the same acts of which Ms. Mabus complains. As such, allowing Ms. Mabus' lawsuit would be the same as saying that religious institutions and their clergy have inferior rights (in the form of greater duties) simply

"because of their religious affiliation and commitments," contrary to the clear import of this court's previous rulings. *Id.*

In general, the Free Exercise Clause requires that a law be neutral and of general applicability or be justified by a compelling government interest, which will be strictly scrutinized by the courts.[5] *Employment Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 893 (1990). "[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533; *see, e.g., Smith*, 494 U.S. at 878-79. Obviously, a common law rule that allows the targeting of religious status and affiliation for a special standard or duty of care is not facially neutral. To the contrary, the civil liability Ms. Mabus impermissibly seeks to impose is "because of, not merely in spite of," religious status and affiliation of these Petitioners. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520 (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, n. 24 (1979)). Because the decisions of the Court below selectively impose duties on Petitioners based solely upon their religious status, when the same burdens are not imposed on others similarly situated, the duties are neither neutral as to religion, or generally

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[5] The "neutrality" and "general applicability" requirements sometimes differ in application, but usually overlap. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520. Such is the situation herein; so Petitioners will discuss the two requirements together.

applicable. *Id.* at 543. Thus, the lower courts' decisions are in violation of this Court's neutrality requirement.

There is no compelling state interest that would allow the singling out of religious entities and members of the clergy for specialized civil duties of care.

> A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

*Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520; *see also Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Ms. Mabus has never asserted, and the lower courts in this case have never articulated, a state interest furthered through the imposition of this higher duty of care. Petitioners submit there is no state interest that would transform this matter into one of those "rare cases" in which a state interest survives strict scrutiny. *Id.*

## III. THE WRIT SHOULD BE GRANTED BECAUSE NUMEROUS DECISIONS ACROSS THE COUNTRY REFLECT A CONFLICT ON THE SCOPE OF FIRST AMENDMENT PROTECTIONS IN CASES INVOLVING THE CONDUCT OF RELIGIOUS INSTITUTIONS AND CLERGY

The Writ should be granted because the decisions below conflict with most authority from other lower courts, and because granting the Writ would allow this Court to provide guidance to the lower courts on a fundamental constitutional issue that has arisen repeatedly.

Numerous courts, both state and federal, have been confronted with claims similar to the claims presented herein. The claims are often presented under varying titles, but all invariably involve courts determining how the First Amendment applies when religious practices are singled out for special duties, or whether a civil court can address ecclesiastical beliefs and doctrines.

When a claim is styled as one of clergy malpractice, lower courts outside of Mississippi have consistently declined to recognize the claims based upon First Amendment grounds.[6] As one court explained:

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[6] *See, e.g., Borchers v. Hrychuk*, 126 Md.App. 10, 23-24, 727 A.2d 388, 392 (Md.App.1999); *Doe v. Evans*, 718 So. 2d 286, 291 (Fla. App. 1998) (holding, "First Amendment bars claims for clergy malpractice because such a claim requires a court to determine 'whether the adherent of a particular faith has properly interpreted the tenets of that faith.' "); *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661, 663 (N.Y. 2000) ("[A]ny attempt to define the duty of care owed by a member of the clergy to parishioner fosters 'excessive entanglement with religion'.") (*Joshua S. v. Casey*, 206 A.D.2d 839; *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991)); *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987); *Byrd v. Faber*, 565 N.E.2d 584 (1991); *Strock v. Pressnell*, 527 N.E.2d 1235 (1988); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907 (Neb. 1993); *Amoto v. Greenquist*, 679 N.E.2d 446, 450 (Ill. App. 1 Dist. 1997) ("To permit claims for clergy malpractice would require courts to establish a standard of reasonable care for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of doctrine."); *Braumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319 (1986); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1998); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okl. 1993); *Fontaine v. Roman Catholic Church of Archdiocese of N.O.*, 625 So. 2d 548

> [S]uch a claim requires definition of the relevant standard of care. Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a variety of religions with widely varying beliefs. Furthermore defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them. The entanglement could restrain the free exercise of religion.

*Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822 (Mich. App. 1999). However, the lower courts' rulings in the case *sub judice* refuse to recognize the unanimous reasoning of the courts across the country and allow Respondent to proceed on her claim of clergy malpractice against McBride, the Church, and the Diocese.

With claims styled as breach of fiduciary duty, the decisions in the courts have not been as uniform.[7] At least

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(La. App. 1993); *E.J.M. v. Archdiocese*, 622 A.2d 1388 (P.A. Super. 1993); *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822 (Mich. App. 1999).

[7] Many of the courts on both sides of the First Amendment issue have also struggled to determine if a claim for breach of fiduciary duty is essentially another way of stating a claim for clergy malpractice, which has been universally rejected on First Amendment grounds, and if not, whether the First Amendment is applied differently to the different claims. Some courts have found that claims for breach of fiduciary duty and clergy malpractice are distinguishable but still allowed a First Amendment bar for claims of breach of fiduciary duty under the facts before them. *See, e.g., Doe v. Baker*, 2000 WL 38445 *8 (Conn. Super. 2000) (distinguishing between claims for clergy malpractice and breach of fiduciary duty, "[A] fiduciary or confidential relationship is characterized by a unique degree of

two federal circuit courts of appeal have reached differing results when addressing this issue.[8] However, a

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trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to present the interest of the other. Professional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty."); *Doe v. Evans*, 718 So. 2d 286, 291 (Fl. App. 1998); *Doe v. Hartz*, 52 F. Supp.2d 1027 (N.D. Iowa 1999). Others have held that a claim for fiduciary duty is just another way of claiming clergy malpractice and refuse to entertain such claim. *See, e.g., Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822 (Mich. App. 1999).

[8] *See Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999). In *Dausch v. Rykse*, the Court of Appeals for the Seventh Circuit refused to allow a claim for breach of fiduciary duty against a pastor and church defendants, recognizing First Amendment protections. The court reasoned,

> If the court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and to evaluate Rykse's conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the Free Exercise Clause.

*Dausch*, 52 F.3d at 1438-9. In *Martinelli v. Bridgeport Roman Catholic Diocesan Corporation*, the Court of Appeals for the Second Circuit found that the First Amendment did not bar a claim for breach of fiduciary duty against a diocese. *Martinelli*, 196 F.3d at 430-31. The court found that there was ample evidence apart from the evidence of a religious nature to conclude that a fiduciary duty existed; however, it recognized a distinction between "the proper use of religious principles as facts and an improper decision that religious principles are true or false" and allowed evidence of religious matters to prove the existence of a fiduciary duty. *Id.*

majority of courts hold that attempting to define the relationship between a priest and a parishioner, and the duty ultimately owed in such relationship, excessively entangles the court in religious matters and inhibits the free exercise of religion, taking it into territory forbidden by the First Amendment.[9] A small minority of courts

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[9] *See, e.g., Doe v. Baker*, 2000 WL 38445 (Conn. Super. 2000); *DeCorso v. Watchtower Bible & Tract Society of New York*, 2000 WL 1687110 (Conn. Super. 2000); *Doe v. Evans*, 718 So. 2d 286, 293 (Fl. App. 1998) (holding "[C]hurch's policies undoubtedly differ from the rules of another employer, and may require the nonsecular employer to respond differently when faced with such allegations. When a secular court interprets church law, policies, and practices it becomes excessively entangled in religion"); *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Amoto v. Greenquiest*, 679 N.E.2d 446, 454 (Ill. App.3d 1997) (holding "Although we agree . . . that the relationship between a cleric and parishioner reflects many aspects of a fiduciary one, we hold that under Illinois law, a contention that a cleric has breached his duty as a fiduciary is not actionable. We believe that when a parishioner lodges such a claim, religion is not 'merely incidental' to a plaintiff's relationship with a defendant, it is the foundation for it."); *Doe v. Hartz*, 52 F. Supp.2d 1027, 1064 (N.D. Iowa 1999) (holding "[S]tatus as a priest, standing alone, . . . is [not] enough to establish a fiduciary duty to all and sundry to refrain from certain conduct."); *Dushkin v. Desai*, 18 F. Supp.2d 117, 122 (D. Mass. 1998) (holding "[T]his court declines to expand Massachusetts doctrine to encompass a fiduciary duty owed persons by their spiritual or religious advisors based on the spiritual nature of the relationship alone."); *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822 (Mich. App. 1999) (holding "First, such a claim requires definition of the relevant standard of care. Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a variety of religions with widely varying beliefs. Furthermore, defining such a standard would require courts to identify the beliefs and

have upheld claims against clergy for breach of fiduciary duty toward their parishioners, finding that they could determine the existence of such a relationship without reference to religious doctrine.[10]

The general rule in courts across the country addressing the First Amendment implications involved in allowing a claim for negligent hiring, retention and supervision of clergy is that the First Amendment forecloses all claims against religious entities.[11] A clear

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practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them. The entanglement could restrain the free exercise of religion."); *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661 (N.Y. A.D. 2000); *Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) (holding "[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the [c]ourt would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence.") *Hodges v. Kleinwood Church of Christ*, 2000 WL 994337 (Tex. App. 2000); *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App. 2000).

[10] *See, e.g., Moses v. Diocese of Colorado*, 863 P.2d 310 (Col. 1993) (allowing claim for breach of fiduciary duty where a priest had sex with a parishioner who had a personality disorder); *F.G. v. McDonnell*, 696 A.2d 697 (N.J. 1997) (remanded for a determination of whether it would cause excessive entanglement to determine if sexual misconduct of priest violated a fiduciary duty); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999) (involving sexual misconduct).

[11] *See, e.g., Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Ayon v. Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Hodges v. Kleinwood Church of Christ*, 2000 WL 994337 (Tex. App.); *Doe v. Evans*, 718 So. 2d 286 (Fl. App. 1998); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997);

example of the reasoning applied by these courts can be found in *Ayon v. Gourley,* where the District Court for the Federal District of Colorado held that both the Free Exercise and Establishment Clauses would be violated by allowing a claim for negligent supervision and retention of a priest by a church defendant.[12]

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*Germain v. Pullman Baptist Church,* 980 P.2d 809 (Wash. App. 1999); *Beach v. J. Jean,* 746 A.2d 228 (Conn. 1999).

[12] Quoting from the court's opinion in *Ayon v. Gourley,*

> [T]he [c]ourt finds that [p]laintiff's negligent hiring claim would violate both the Free Exercise and Establishment Clauses. Like the majority of the cases cited, this [c]ourt finds that consideration of the hiring policies of the [a]rchdiocese [d]efendants would inevitably require examination of church policy and doctrine. The choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution. It is one of the most important exercises of a church's freedom from government control. For this [c]ourt to insert itself into the process by which priests are chosen would substantially burden the [d]efendants' free exercise of a crucial power to control the future of the church and therefore constitute interference with the practice of their religion.
>
> It would also cause excessive entanglement in church operations by fostering inappropriate government involvement. The application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness. Such court examination and oversight of internal church policies would constitute an encroachment on the church's religious function. . . .

In summary, due to the number of times the issue has arisen, and because the First Amendment is invariably implicated, either expressly or implicitly, the granting of this Petition would not only uphold Petitioners' First Amendment Rights, but would also provide useful guidance to federal and state courts by clarifying the scope and application of the First Amendment in such cases.

## IV. THE WRIT SHOULD BE GRANTED TO PREVENT IRREPARABLE HARM AND BECAUSE OF THE IMPORTANCE OF THE ISSUES PRESENTED

The pleadings and records before the Mississippi courts make clear: (1) that interpretation of religious doctrine and belief is necessary to adjudicate Ms. Mabus' claims and (2) that Ms. Mabus' claims are based exclusively upon Defendants' religious status. As set forth above, adjudication of ecclesiastical claims is outside the jurisdictional scope of civil courts, the interpretation of

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> While [p]laintiff attempts to characterize this as a normal supervision claim, the reality is that practices of disciplinary actions, reprimand write-ups and grievance procedures are improbable in a church setting. Instead, like the hiring claim, the procedures that the [a]rchdiocese [d]efendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate. This would clearly be inappropriate governmental involvement and a burden on these [d]efendants' exercise of religion. Consequently, [p]laintiff's claims against the [a]rchdiocese [d]efendants must be dismissed as violative of the First Amendment.

*Ayon v. Gourley*, 47 F. Supp.2d 1246, 1250-51 (D. Colo. 1998).

ecclesiastical doctrine results in excessive entanglement, and religious persons and institutions may not, consistent with the Religion clauses, be held to a special standard of care based solely upon religious status.[13] Petitioners have exhausted all avenues of relief below. Therefore, granting the Writ is necessary to preclude irreparable harm.

Moreover, the opinions of the courts below in this case (if not corrected) will have an expansive impact on the religious freedoms of every individual throughout the State of Mississippi. These decisions not only affect these Petitioners or the Episcopal churches and/or dioceses but every clergy or person holding a position of religious importance and every religious sect or organization upon whom the Mississippi state courts may assume jurisdiction. As pointed out by Mississippi's Chief Justice, these decisions allow religious status and affiliation to thrust upon every individual and entity, within the jurisdiction of Mississippi, civil duties and liabilities, above and beyond those of ordinary citizens, and provide courts the authority to probe into religious doctrines, polity, and beliefs to interpret whether clergymen and religious entities acted in accordance therewith.

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[13] Plaintiff's theory of civil liability is based on, or purportedly based on, state common law. Such constitutes state action for purposes of the Fourteenth Amendment. As this Court has held, "Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)).

The enormity of the infringement on religious freedoms that the precedent of the Mississippi courts' decisions allow can not be overstated. The decisions of the Mississippi courts place special burdens on religion, and have the practical effect of allowing the courts, rather than the religious entities, to make, interpret, regulate and apply ecclesiastical law specifically applicable to persons and entities associated with religious organizations. Allowing a civil state court to define and apply a standard of conduct for all clergy, or the particular standard of conduct applicable to a particular religious sect, allows direct state regulation of religion; or, put another way, the "establishment" of a state controlled church. If the decisions below are allowed to stand, religious bodies, whether Episcopal, Baptist, Catholic, Methodist, Jewish, Muslim, Buddhist, or other, would find themselves forced to study civil law, as opposed to their religious scripture and internal documents, to determine the correctness of their religious behavior. Furthermore, they would continually be faced with the real probability: (1) that they may be mandated to testify on the record in civil courts with regard to those doctrines, practices and actions, or lack thereof; (2) that such could be admissible at trial; and (3) that such could be used against them to impose legal liability. Such a climate would clearly chill religious expression and conduct in general and specifically, in this case, cause this Diocese and the Church to avoid interpreting their own religious doctrines during the pendency of this litigation, regardless of the ultimate outcome.

Finally, and most importantly, the decisions of the Mississippi courts below fly in the face of the longstanding historical precedent in this country that clergy and religious bodies, while subject to general laws applicable to all, answer to their God, not the state, in matters particular to their religious calling. Thus, it is of prime importance that this Court take this opportunity to provide direction to these courts and restore the First Amendment rights of these Defendants before these rights are further breached and irreparably harmed.

## CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JULIE MABUS — PLAINTIFF

V. — CAUSE NO. 251-01-23CIV

ST. JAMES EPISCOPAL CHURCH, *et al* — DEFENDANTS

**ORDER**

THIS CAUSE having come on for hearing on the Defendants' Revised Motion to Dismiss for Failure to State a Claim, and the Court, having considered the briefs and argument of counsel for the parties, grants the motion in part and denies the motion in part.

IT IS, THEREFORE, ORDERED as follows:

That the plaintiff's claim for invasion of privacy has been conceded by the plaintiff as being time-barred and it is hereby dismissed with prejudice. Each party is to bear their own costs.

That the Motion to Dismiss is denied with respect to all of the plaintiff's remaining claims.

That the order staying discovery pending a ruling on the Motion to Dismiss is lifted and, thus, discovery may commence.

SO ORDERED this the 27 day of August, 2001.

/s/ L. Breland Hilburn
CIRCUIT COURT JUDGE

Presented to the Court by:
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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

JULIE MABUS — PLAINTIFF

V. — NO. 251-01-23

SAINT JAMES EPISCOPAL CHURCH,
REVEREND JERRY MCBRIDE,
EPISCOPAL DIOCESE OF
MISSISSIPPI — DEFENDANTS

**********

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE MOTION HEARING OF THE ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE L. BRELAND HILBURN, CIRCUIT JUDGE, SOLE PRESIDING, ON THE 17TH DAY OF SEPTEMBER, 2001.

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* * *

[11] we were submitting that.

THE COURT: No, sir. I don't – that has never been my interpretation of the rule. I was just simply pointing out that there are times when public policy does require that there be controls on the – concerning separation of powers.

MR. ROSS: That's our first motion, Your Honor. I don't know if plaintiff has anything or not.

THE COURT: I am going to overrule the motion to reconsider.

MR. ROSS: Your Honor, our second motion goes to the issue of if there was some duty of confidentiality that existed at that meeting in January of 1998, did Mrs. Mabus waive that duty at a subsequent time or waive any rights to assert a violation of that duty. If I could approach, Your Honor.

Starting at the bottom of page 11. After this meeting in 1998 –

THE COURT: What is the – it is on here. I'm sorry. I see it. January 11?

MR. ROSS: Right.

After the meeting that was taped, Mr. Mabus and Mr. Mabus –

MS. NESTER: Excuse me. Excuse me, Mr. Ross. I am sorry to interrupt you. Judge, it may be – I think you are trying to argue

* * *

**IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

**JULIE MABUS** **PLAINTIFF**

**V.** **CAUSE NO. 251-01-23CIV**

**ST. JAMES EPISCOPAL CHURCH,
EPISCOPAL DIOCESE OF MISSISSIPPI,
INC. JERRY MCBRIDE AND
JOHN DOES 1-10** **DEFENDANTS**

**ORDER DENYING CERTIFICATION OF
ORDER FOR INTERLOCUTORY APPEAL AND
STAY OF PROCEEDINGS**

THIS matter having come before this Court on the motion of the Episcopal Diocese of Mississippi, Inc., and St. James Episcopal Church, for Certification of Order for Interlocutory Appeal and Stay of proceedings, which Motion was joined by Jerry McBride, and after the Court fully reviewed said Motion, this Court is of the opinion that the Motion is not well taken and should be denied.

IT IS SO ORDERED that the Motion for Certification of Order for Interlocutory Appeal and for Stay of Proceedings in this matter brought before this Court on behalf of the Episcopal Diocese of Mississippi, Inc., and St. James Episocopal Church and joined by Jerry McBride is hereby denied.

SO ORDERED, THIS THE 18 day of Sept, 2001.

/s/ L. Breland Hilburn
Honorable L. Breland Hilburn

**Prepared by:**

/s/ Brenda Currie
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Serial: 91959

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2001-M-01558**

***JULIE MABUS***

***v.***

***ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10***

**ORDER**

(Filed Nov. 29, 2001)

This matter came before the Court sitting en banc on the Petition for Interlocutory Appeal filed by St. James Episcopal Church, the Episcopal Diocese of Mississippi, Inc., and Jerry McBride (Petitioners). The Court has also considered the Motion of Petitioners for Stay of Proceedings and Request for Expedited Consideration (Motion for Stay and Expedited Consideration), Julie Mabus' Response, and the Petitioners' Reply.

After due consideration, the Court finds that the Petition for Interlocutory Appeal should be denied. The Court further finds that the Motion for Stay and Expedited Consideration should be dismissed as moot.

IT IS THEREFORE ORDERED that the Petition for Interlocutory Appeal is denied.

IT IS FURTHER ORDERED that the Motion for Stay and Expedited Consideration is dismissed as moot.

SO ORDERED, this 29th day of November, 2001.

/s/ Chuck McRae
CHUCK MCRAE,
PRESIDING JUSTICE
FOR THE COURT

TO DENY: McRAE, P.J., DIAZ, EASLEY AND CARLSON, JJ.

TO GRANT: PITTMAN, C.J., WITH SEPARATE STATEMENT JOINED BY SMITH, P.J., WALLER AND COBB, JJ.

NOT PARTICIPATING: GRAVES, J.

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**PITTMAN, CHIEF JUSTICE, SEPARATE STATEMENT ON ORDER.**

By today's evenly divided decision, the Court has declined to grant the interlocutory appeal sought by the petitioners and to stay proceedings in the trial court. I respectfully dissent from this result and write to explain my serious concerns.

Ms. Mabus has brought this action against not only Rev. McBride, but also against St. James Episcopal Church, the Episcopal Diocese of Mississippi, Inc. and ten unidentified parties who may include the priests and officials of the church and diocese. She alleges that Rev. McBride breached a fiduciary duty in participating in the audiotaping of her, his parishioner, during a counseling session and further alleges that the special relationship is grounded in his position as spiritual leader of the church.

She also alleges that the church and the diocese failed to appropriately and adequately train and supervise Rev. McBride. Rev. McBride, the church and the diocese filed this petition seeking interlocutory appeal from the decision of the trial court denying their motion to dismiss. It appears that now discovery, including depositions of several priests and the bishop, is underway.

The petition filed by the diocese and Rev. McBride argues that Mississippi does not impose duties on priests above those imposed on other citizens, and that to do so would violate the First Amendment of the United States Constitution. The Mississippi courts have never decided this question. Our case law shows a strong reluctance to intervene in church activities. For these reasons and others, an interlocutory appeal should be granted. Generally, because of First Amendment considerations, states will not recognize suits for malpractice against clergy. A recent article in the Indiana Law Journal summarizes this position.

> To date, in fact, every jurisdiction presented with the opportunity has refused to recognize [a cause of action for clergy malpractice], often because the issue of reasonableness – manifest as a "reasonably prudent clergy" standard – so starkly and unavoidably reeks of unconstitutional [church/state] entanglement. . . .
>
> Similar or analogous reasoning has led many (though not all) courts also to reject claims against religious defendants for breach of fiduciary duty, negligent hiring or retention or

> transfer, negligent supervision, tortious interference with contract, negligent infliction of emotional distress, and defamation or other tortuous [sic] speech.

Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 Ind. L.J. 219, 232-234 (2000).

This important question remains open and undecided in Mississippi. This is certainly not just another defendant. We should not open the church and its priests and ministers to ordinary malpractice law suits. The order here entered allows the plaintiff to conduct discovery in regards to St. James Church activities, management and personnel, and further allows, without restraint, the plaintiff to employ discovery of the dioceses and its activities. No harm could come from allowing this Court to rule on the fundamental legal questions at this stage. Harm may result if the respondent is allowed to prowl the internal operations of this or any church in an action for which the law may ultimately be determined to offer no legal cause of action. An interlocutory appeal should be granted to first determine Mississippi's law with regard to the questions raised and to avoid possible harmful unrestricted discovery and depositions of church life.

**SMITH, P.J., WALLER AND COBB, JJ., JOIN THIS SEPARATE STATEMENT**

Serial: 92713

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2001-M-01558**

***JULIE MABUS***

***Plaintiff/Respondent***

*v.*

***ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10***

***Defendants/Petitioners***

**ORDER**

(Filed Jan. 07, 2002)

This matter came before the undersigned Justice on the Petitioners' Motion Pursuant to Rule 40 for Reconsideration, or In The Alternative, Pursuant to Rule 2 for Suspension of Rules ("Motion for Reconsideration"). Julie Mabus has filed a Response, which contains a request for attorney's fees for defense against the Motion for Reconsideration.

Petitioners seek reconsideration of this Court's Order handed down November 29, 2001, which denied the petition for interlocutory appeal. After due consideration, the undersigned Justice finds that the Motion for Reconsideration should be denied in accordance with M.R.A.P. 27(h). Julie Mabus's request for attorney's fees is not well taken and should be denied.

IT IS THEREFORE ORDERED that the Motion for Reconsideration is denied. Julie Mabus's request for attorney's fees is also denied.

SO ORDERED, this 7th day of January, 2002.

/s/ Chuck McRae
CHUCK MCRAE,
PRESIDING JUSTICE

## United States Constitution

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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### Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JULIE MABUS — PLAINTIFF

V. — CAUSE NO 251-01-23CIV

ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE and JOHN DOES 1-10. — DEFENDANTS

## FIRST AMENDED COMPLAINT

(Filed March 30, 2001)

**JURY TRIAL REQUESTED**

COMES NOW Plaintiff, Julie Mabus, and files this her Complaint for damages against Defendants St. James Episcopal Church, Episcopal Diocese of Mississippi, Inc., Jerry McBride, and John Does 1-10, as follows:

### PARTIES

1. Defendant St. James Episcopal Church (hereinafter referred to as "St. James") is a non-profit corporation doing business in the State of Mississippi and can be served with process of this Court by service upon Glover A. Russell, Jr., 200 S. Lamar St., Number 500, Jackson, Mississippi 39203.

2. Defendant Episcopal Diocese of Mississippi, Inc., (hereinafter referred to as "Diocese") is a Mississippi corporation licensed to do business and doing business in the State of Mississippi and can be served with process of

this Court by service upon its registered agent for process.

3. Defendant Jerry McBride is an adult resident citizen of the State of Mississippi.

4. Defendants John Does 1-10 are individuals and/or entities that may have contributed to the damages suffered by Plaintiff as described below and whose identities are unknown to Plaintiff at this time. Plaintiff hereby requests to amend this Complaint upon the discovery of said individuals.

## JURISDICTION AND VENUE

5. This Court has jurisdiction over the parties and over the subject matter herein.

6. Venue is proper in this Court in that Plaintiff's injuries occurred in the First Judicial District of Hinds County, Mississippi.

## FACTS

7. On or about January 7, 1998, Plaintiff Julie Mabus agreed, at the request of her husband Ray Mabus, to attend a marital counseling session with her priest. Her priest was Father Jerry McBride, who was at all relevant times to this Complaint an ordained Episcopalian priest pastoring at St. James Episcopal Church in Jackson, Mississippi.

8. Julie Mabus was an active, lifelong member of St. James Episcopal Church, Father McBride officiated at her wedding and both of her children were baptized at St.

James Episcopal Church. Ray Mabus is not, and has never been, a member of St. James Episcopal Church, nor was he raised in the Episcopal religion. On information and belief, Ray Mabus had little or no formal religious beliefs, although after entering politics he has stated he was a Methodist.

9. St. James Episcopal Church was and is a parish under the control and supervision of and operating under the rules and regulations of the Episcopal Diocese of Mississippi, Inc.

10. Unbeknownst to Plaintiff, during the counseling session of January 7, 1998, Plaintiff's husband at the time, Ray Mabus, was surreptitiously audiotaping the counseling session. Father McBride had previously been told by Mr. Mabus that he would record the session without Mrs. Mabus's knowledge or consent. Furthermore, Father McBride knew of and condoned Mr. Mabus's plans to surreptitiously audiotape the session prior to its occurrence. Throughout the counseling session, Father McBridge never revealed to Mrs. Mabus that she was possibly being taped, even when he directed Mr. Mabus to leave the room, leading Julie Mabus to believe that their conversation was being held in confidence.

11. As a direct and proximate result of Father McBride's presence at the counseling session, Julie Mabus confided personal and confidential matters during the session. At all times during the session, Julie Mabus expected and believed that her comments to her priest, acting as a marital counselor, would remain privileged

and confidential. At no time prior to or during the counseling session did Julie Mabus consent to the recording of her statements.

12. Subsequent to the counseling session, Julie Mabus's private and confidential statements to her priest were disseminated by Father McBride to third parties, without Mrs. Mabus's consent, and were ultimately used against her in a custody proceeding resulting in her loss of the legal custody of her young children and loss of their physical custody for a period of six months every year.

13. At all times during the counseling session, Father McBride was acting in his official capacity as the Rector and spiritual leader of St. James Episcopal Church and as such, was an integral component of the church itself. To date, Julie Mabus cannot cope with the fact that she was ambushed and betrayed by her own church and Priest.

## CAUSES OF ACTION

### COUNT ONE: BREACH OF FIDUCIARY DUTY

14. Paragraphs 1-13 are incorporated herein.

15. Father McBride's position as priest of St. James Episcopal Church placed him in a special relationship of trust and faith with his parishioners.

16. At all times relevant to this Complaint, Father McBride had a duty and obligation to his parishioners to maintain and respect the privacy and confidentiality of their confessions and/or communications.

17. Father McBride's knowing participation in the surreptitious audiotaping of his parishioner, for purposes to her detriment, during a confidential counseling session constituted a breach of his fiduciary duty to Julie Mabus.

18. At all times that Father McBride was breaching his fiduciary duty to Julie Mabus, he was acting as the spiritual leader of St. James Episcopal Church in furtherance of the goals and interests of Defendant St. James and/or Defendant Diocese.

COUNT TWO: FRAUDULENT CONCEALMENT

19. Paragraphs 1-18 are incorporated herein.

20. Father McBride knowingly concealed material facts from Julie Mabus; specifically that she was being audiotaped, in order to induce her to reveal personal and private matters in a confidential counseling session. Father McBride concealed these facts knowing that Julie Mabus would rely on his representations to her detriment.

21. At all times that Father McBride was fraudulently concealing facts from Julie Mabus, he was acting as the spiritual leader of St. James Episcopal Church in furtherance of the goals and interests of Defendant St. James and/or Defendant Diocese.

COUNT THREE: NEGLIGENT MISREPRESENTATION

22. Paragraphs 1-21 are incorporated herein.

23. Father Jerry McBride, acting in his capacity as spiritual leader of St. James Episcopal Church, misrepresented a material fact to Julie Mabus. Specifically, Julie Mabus was led to believe that when Father McBride asked Ray Mabus to leave the room so that Father McBride could talk privately with Julie Mabus that they were, in fact, speaking privately.

24. Father McBride failed to exercise a reasonable degree of care and/or diligence to determine whether or not Julie Mabus had been informed she was being surreptitiously recorded during the counseling session.

25. Julie Mabus relied, to her shock and detriment, on Father McBride's misrepresentations of fact and suffered damages as a result of her reasonable reliance on said misrepresentations. Therefore, Father McBride committed the tort of negligent misrepresentation.

26. At all times that Father McBride was misrepresenting facts to Julie Mabus, he was acting as the spiritual leader of St. James Episcopal Church and in accordance with the Cannons of the Episcopal religion and in furtherance of the goals and interests of Defendant St. James and Defendant Diocese.

## COUNT FOUR: INVASION OF PRIVACY

27. Paragraphs 1-26 are incorporated herein.

28. Father McBride's knowing participation in the recording of Julie Mabus's private confessions/communications foreseeably enabled the public release of Mrs. Mabus's most intimate matters, without her consent.

29. This public release of private information constituted an invasion of Julie Mabus's privacy.

30. At all times that Father McBride was invading Julie Mabus's privacy, he was acting as the spiritual leader of St. James Episcopal Church and in the furtherance of the goals and interests of Defendant St. James and/or Defendant Diocese.

## COUNT FIVE: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

31. Paragraphs 1-30 are incorporated herein.

32. Father McBride's act of participating in a surreptitious tape-recording of a religious counseling session, when he knew or should have known that the tape-recording was for purposes that would harm Mrs. Mabus's interests, negligently inflicted emotional anguish and distress upon Mrs. Mabus.

33. At all times that Father McBride was negligently inflicting emotional distress, he was acting as the spiritual leader of St. James Episcopal Church and in the furtherance of the goals and interests of Defendant St. James and/or Defendant Diocese.

COUNT SIX: NEGLIGENT RETENTION/SUPERVISION

34. Paragraphs 1-33 are incorporated herein.

35. Defendants St. James and Diocese knew or should have known that they were inadequately training and supervising Father Jerry McBride.

36. Defendants St. James and Diocese knew or should have known that Father Jerry McBride could not be trusted to follow the Cannons of the Episcopal religion and maintain the confidence and/or trust of parishioners.

37. Despite Defendants' St. James and Diocese's knowledge, they failed to take appropriate steps to supervise Father McBride's interaction with parishioners and they continued to enable his service as the spiritual leader of St. James Episcopal Church at the risk and peril of the privacy of their parishioners.

COUNT SEVEN: CLERGY MALPRACTICE

38. Paragraphs 1-37 are incorporated herein.

39. Father McBride, Defendant St. James and Defendant Diocese took steps to encourage their parishioners to engage in marital counseling services with the ordained priests, including Father McBride. These priests, including Father McBride, were provided with specialized training and standards of care in the area of counseling so that they could meet the needs of troubled parishioners.

40. Father McBride's acts in violating the trust and confidentiality of a parishioner by permitting surreptitious taping of a confidential counseling session by a

third party and his failure to address the parishioner's distress resulting from the priest's betrayal violated the generally accepted standards of care adopted by clergy professionals and constituted clergy malpractice.

41. Defendants St. James' and Diocese's failure to appropriately and adequately train and/or supervise their priests acting as marital counselors and their failure to address Julie Mabus's complaints of betrayal by her priest also violated generally accepted standards of care and constituted clergy malpractice.

## DAMAGES

42. As a direct and proximate result of Defendants' wrongful conduct described in paragraphs 7-41 above, Julie Mabus suffered damages including but not limited to:

a) Costs of medical care and counseling in an amount exceeding $10,000.00,

b) Extreme emotional distress and mental anguish resulting from her loss of her life-long belief in her religion and church based on her priest's betrayal in the ambush, which she also perceived to be a cause in the loss of the custody of her children,

c) Damage to reputation,

d) Great personal humiliation and embarrassment, and

e) Lost sources of income.

43) Because Defendants' actions were reckless and/or intentional and malicious, Julie Mabus requests punitive damages to punish Defendants' outrageous behavior and to deter future similar conduct from Defendants or others similarly situated to them.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Julie Mabus sues and demands judgment of and from the defendants, jointly and severally, for actual, compensatory, general, incidental and consequential damages in an amount exceeding the minimum jurisdictional limits of this Court to be determined at trial, which will reasonably compensate the plaintiff for her damages suffered as a proximate result of defendants' wrongful conduct toward her, prejudgment and postjudgment interest, costs and any other damages to which she is entitled under the law. Furthermore, Plaintiff prays that the defendants, jointly and severally, be required to pay the plaintiff punitive damages, to be determined and assessed at trial, in an amount sufficient to punish the defendants for committing the same misconduct, or misconduct similar to, that of which Plaintiff complains herein and which will reasonably prevent and deter the defendants and others similarly situated, from engaging in such misconduct in the future.

Respectfully submitted,

JULIE MABUS, PLAINTIFF

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IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

JULIE MABUS — PLAINTIFF

VERSUS — NO. 251-01-023

ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10 — DEFENDANTS

**********

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE MOTION TO DISMISS OF THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE L. BRELAND HILBURN, CIRCUIT COURT JUDGE, ON THE 15TH DAY OF AUGUST, 2001.

**********

* * *

[38] was tortious and that for some reason that puts a higher standard on Reverend McBride than the average person.

Your Honor, we're clearly not suggesting just the taping was tortious. If the priest and Julie Mabus met in his chambers and had a conversation and he taped it and locked it in his drawer, there would never be a case here. That's not the issue.

The issue is that what was behind the taping, an intent to disclose and, in fact, a later disclosure by both Ray Mabus and Reverend McBride which we have alleged in our complaint which the Court must take as true.

They've suggested to the Court that if a neighbor or a friend had been at that meeting that there would be no case here. We certainly agree with that.

However, if her lawyer had been there, there would be a case here. If her accountant, her banker, any other person who had a special duty of trust was at that meeting, there would certainly be a case here. There was no reason under the law or authority under the law to exempt priests from the same requirements once they enter into this

* * *

[45] a question of fact, and we establish that by them calling their witnesses up there and saying, oh, whether or not to reveal the confidences of a confession, that's purely a church matter, and then we call experts that get up there, Episcopalian experts that understand and are familiar with their doctrines, and say, well, no actually, it's just the opposite, and then the jury goes off and decides the question of fact. So, once again, we have another question of fact where a motion to dismiss is not proper.

And I want to be clear. The main reason the First Amendment doesn't apply here is because everything we alleged in that complaint, not one thing involves their religious interpretation. I mean that's just clear-cut. It doesn't get any simpler than that.

Now, Charlie Ross made this very dramatic point about and, as you know, Your Honor, the court cannot get into church rules, and the point I'd like to make is the church is not above the law. The court can get into church

rules if it does not involve fundamental investigations into religious doctrine.

They do it all the time. They've

* * *

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August 27, 2001

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Re: Julie Mabus v. St. James Episcopal Church, et al.

Dear Counsel:

Today we received Judge Hilburn's signed order lifting the stay of discovery in our case. Therefore, we intend to propound our written discovery requests very soon. We would like to go ahead and clear some deposition dates now that are far enough away to allow us to receive our written discovery responses first. Charlie Ross, Bryan Buckley and I are all available on the following dates: October 31 and November 1, 2, 12, 13. We have left a message for Roe Frazer, Esq., to discuss whether Governor Mabus would be available on any of these dates and I am also sending Roe a copy of this letter. Please let me

know as soon as possible which of these dates you would be available so we can keep these dates clear on our calendars. As of right now, we intend to depose the following individuals: Governor Mabus, Jerry McBride, Rev. Buddy Stallings, Rev. Susan Boch, Bishop Marble, Rev. Molly McBride, James Holland, Esq., Wood Hiatt.

Judge Hilburn requested that we draft an agreed scheduling order. I will be happy to draft it once we agree on some firm deposition dates. I will propose a motion deadline that falls a few weeks after discovery is completed. I will also be pleased to get available trial dates from Jamie for you to review. I look forward to hearing from you all soon.

Sincerely,

/s/ Kathryn N. Nester
Kathryn N. Nester

Cc: Roe Frazer, Esq.
Jane E. Tucker, Esq.
Bryan P. Buckley, Esq.
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December 18, 2001

Honorable Charles E. Ross
Wise Carter Child & Caraway
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Jackson, MS 39205-0651

Re: Julie Mabus v. St. James Episcopal Church, et al.

Dear Senator Ross:

Please provide my office at your earliest convenience with available dates for the taking of depositions of Bishop Marble, Buddy Stallings and whoever was the head of the vestry during the years of 1998, 1999, 2000. I await a reply from you.

Sincerely yours,

/s/ Kathryn N. Nester
Kathryn N. Nester

KNN/dje
Cc: Robert Malouf, Esq.
Dorrance Aultman, Esq.
Bryan Buckley, Esq.
Ms. Julie Mabus

Supreme Court, U.S.
FILED
APR 1 2002
CLERK

(2)

No. 01-1263

In The

# Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF MISSISSIPPI,
ST. JAMES CHURCH, AND JERRY MCBRIDE,

*Petitioners,*

v.

JULIE MABUS,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Hinds County Circuit Court**
**Of Mississippi, First Judicial District**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Petitioners' "Questions Presented" do not fairly and accurately state the issues that would be before this Court should a writ of certiorari be granted.

1.

Petitioners' first question presented asks whether civil suits based on claims of failure to follow "ecclesiastical laws and canons," are barred pursuant to the First Amendment to the United States Constitution. (Petition, page i) Even a cursory review of the Complaint that is attached to the Petition reflects that Julie Mabus alleges the petitioners acted negligently as defined by Mississippi tort law, *not* ecclesiastical law. (Petition, App. 14-23) The question, as stated, misrepresents the nature of the civil suit and, therefore, incorrectly defines the legal issue before this Court.

Simply because Father McBride may have been violating ecclesiastical laws and canons at the same time he was violating Mississippi tort law does not change the fact that Julie Mabus is seeking damages under state tort law theories routinely applied in cases having nothing whatever to do with religious laws or canons. The jury will not be asked to decide whether or not McBride violated ecclesiastical canons, only whether he violated Mississippi tort law. Because the causes of action as pleaded by Julie Mabus are not based on ecclesiastical doctrine, the first question presented should read:

## QUESTIONS PRESENTED – Continued

**"Is a civil suit against a member of the clergy, and the religious organization of which he is a member, which alleges state tort law claims, outside the subject-matter jurisdiction of the civil courts and barred because of the Religion Clauses of the First Amendment?"**

**2.**

Petitioners' second question presented asks whether the imposition of a "special duty" upon clergy "based solely on religious status or affiliation" violates the Religion Clauses of the First Amendment. (Petition, page i) Julie Mabus disputes that her Complaint requires the imposition of any "special duties" on Father McBride. To the contrary, Father McBride is charged with the same duties as any other Mississippian who would be judged under the state tort laws alleged in the Complaint. These duties are not "based solely on religious status or affiliation" but are required of any Mississippian, irrespective of their religious affiliation. Breach of fiduciary duty, fraudulent concealment, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and negligent supervision are routinely alleged in civil suits throughout the State of Mississippi and the elements required to be proven by Julie Mabus will not differ in this case merely because the defendant is a member of the clergy. Likewise, the clergy malpractice claim simply requires clergy to follow the same standards of professionalism that are applied to doctors, lawyers

## QUESTIONS PRESENTED – Continued

and other counselors and the elements of the tort would not differ among the professions.

If the Court eliminates the misleading phrase "special duty" from the second question presented by Petitioners and substitutes the proper term of "duty" and the phrase "based solely on religious status or affiliation" is removed, then Petitioners are merely rephrasing the issue addressed in the first question presented; i.e., whether clergy are subject to state tort laws. Therefore, Julie Mabus respectfully submits only the first question of law need be presented to this Court if Petitioners' request for review is granted.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Julie Mabus respectfully submits this Brief in Opposition to Petition for Writ of Certiorari and urges this Honorable Court to deny Petitioners' request for an interlocutory review of the order of the Circuit Court of the First Judicial District of Hinds County, Mississippi, denying Petitioners' Revised Motion to Dismiss.

## JURISDICTION

Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257. Julie Mabus respectfully submits that 28 U.S.C. §1257 does not confer jurisdiction upon this Court due to the absence of a final judgment in this case. Petitioner asks this Court to review a denial of a motion to dismiss, which was determined by the Mississippi Supreme Court to be unfit for interlocutory appeal. The order issued by the Circuit Judge denying Petitioners' Revised Motion to Dismiss does not possess sufficient characteristics of finality, as described by this Court in *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975). In *Cox*, this Court acknowledged four categories of cases where this Court will accept a judgment as final even when there are additional proceedings anticipated in the lower state courts.

In the first category are cases where the federal issue is conclusive or the outcome of further proceedings is preordained. *Id.* at 479. In *Mills v. Alabama*, 384 U.S. 214 (1966), for example, this Court reviewed the dismissal of a criminal case on federal constitutional grounds because

the State's highest court had ordered the case remanded for trial and the defendant would have had no other defense available and no hope of prevailing on any non-federal grounds. A trial would have been pointless. The only conceivably disputed issue was presently before this Court. In Julie Mabus's case, Petitioners assert additional defenses unrelated to their First Amendment claim. It is certainly possible that the trial judge or the jury could find in favor of Petitioners, without ever reaching the federal issue. All three defendants currently have summary judgment motions pending which raise non-federal defenses.

In the second category are cases in which the federal issue will survive and require decision regardless of the outcome of future state-court proceedings. *Cox*, 420 U.S. at 480. If the Petitioners prevail at trial, the First Amendment issue will no longer require a decision by this Court. If the Petitioners prevail on their motions for summary judgment that are pending before the trial judge, the First Amendment issue will be moot.

In the third category are cases where the federal claim has been finally decided but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Id.* at 481. In the case at bar the federal issue has not been finally decided. In fact, summary judgment motions are currently pending before the trial court and the trial judge has already stated from the bench that he intends to reexamine the law regarding whether or not Father McBride had a fiduciary relationship with Julie Mabus at the time he considers the summary judgment motions. (App. 1-3) Furthermore, if Julie Mabus prevails at trial the Petitioners in this case would

have the right to appeal to the Mississippi appellate courts, and from there to seek review in this Court. Nothing bars Petitioners from raising the federal issues described in their questions presented during the direct appeal of an unfavorable verdict.

In the fourth and final category, are cases where 1) the federal issue has been finally decided in the state courts, 2) the party seeking review might prevail on non-federal grounds, 3) reversal of the state court on the federal issue would preclude further litigation, and 4) a refusal to review might seriously erode federal policy. *Cox*, 420 U.S. at 482-83. (emphasis added) At least two of the required four elements are not met.

First, the federal issue has *not* been finally decided in the state courts. Indeed, the trial judge stated from the bench that he would re-hear arguments about whether Father McBride had a fiduciary relationship with Julie Mabus at the time he considers the summary judgment motions. (App. 1-3) The Mississippi Supreme Court refused to review the trial judge's order denying the motion to dismiss on its merits prior to the conclusion of the trial. (Petition, App. 7-8) The same issue involving the trial judge's denial of the motion to dismiss may be raised with the Mississippi Supreme Court upon a direct appeal, at which time the Mississippi Supreme Court would have an opportunity to state Mississippi's interpretation of the federal issue raised here.

Second, a refusal to review at this premature stage of the proceedings will not seriously erode federal policy. In fact, this Court has denied certiorari in a case with identical issues of law even after a jury awarded $1,216,500.00 against an Episcopal Diocese in Colorado. *Moses v. Diocese*

*of Colorado*, 511 U.S. 1137 (1994). Surely if this Court found no erosion of federal policy in the face of such a verdict against a religious organization on the same theories of law, there can be no erosion of federal policy to allow Julie Mabus to proceed with her case at least until there has been a final decision on the merits. This Court has emphasized its long-standing policy against interfering in ongoing state court litigation in other doctrines. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971) (federal courts may not enjoin pending state criminal court proceedings) and its progeny. Petitioners have failed to cite a single case in support of the proposition that the Religion Clauses of the First Amendment to the United States Constitution provide blanket protection to clergy from all civil discovery.

## STATEMENT OF PERTINENT FACTS, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Julie Mabus does not dispute the Petitioners' chronology of the proceedings to date in the state courts. Petitioners' assertions that Julie Mabus intends to have a civil court interpret the religious doctrine and canons of the Episcopal Church as a basis for liability are absolutely false. Petitioners rely on a statement made by Julie Mabus's counsel in which counsel stated that experts on Episcopal doctrine might be called to testify before the court. (Petition, page 6, footnote 4) Petitioners use that statement as proof that Julie Mabus intends to probe into their religious beliefs. (Petition, page 6) A close reading of the statement of Julie Mabus's counsel will reveal the exact opposite is true.

Counsel was noting that if the church intends to call witnesses to testify in their defense that Father McBride's deceitful actions were purely a religious matter, Julie Mabus would be able to elicit rebuttal testimony that Father McBride's conduct was *not* part of the belief and practices of the religious group. *Never in any of the numerous briefs filed by Petitioners in the state courts or in this Court have Petitioners suggested that some doctrine of the Episcopal faith compelled Father McBride to act as he did.* The Colorado and Florida Supreme Courts have held that the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact rooted in religious belief. *Malicki v. Doe*, ___ So.2d ___, 2002 WL 390021 (Fla. 2002); *Destefano v. Grabrian*, 763 P.2d 275, 285-88 (Colo. 1988).[1] The

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[1] *See also Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 773 (Okl. 1989) ("because the controversy in the instant case is concerned with the allegedly tortious nature of religiously-motivated acts and not with their acts and not with their orthodoxy vis-à-vis established church doctrine, the justification for judicial abstention is nonexistent and the [First Amendment] does not apply"); *Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996) ("[R]eview only requires the court to determine if the Church Defendants knew of Henson's inappropriate conduct, yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards."); *C.J.C. v. Corporation of Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999) (en banc) ("The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles."); *Martinez v. Primera Asemblea de Dios, Inc.*, 1998 WL 242412, at *3 (Tex. App. May 15, 1998) ("The Free Exercise clause has never

Mississippi Court of Appeals held in *Mallette v. Church of God Int'l*, 789 So.2d 120 (Miss. App. 2001), that a church may be sued for defamation where it disseminates information about a fired minister to unprivileged third parties. Where there is no ecclesiastical justification for the church's actions, the court stated, the First Amendment will not apply. *Id.* Counsel for Mabus was correctly pointing out in his argument that the church and diocese will be unable to prove that ecclesiastical justification exists for McBride's actions.

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immunized clergy or churches from all causes of action alleging tortious conduct. Religious groups may be held liable in tort for secular acts.") (citation omitted); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. 1997) ("Illinois courts may entertain lawsuits alleging tortious conduct by churches and their employees, so long as the resolution does not require the interpretation of either religious doctrine or religious duties imposed on an individual by a particular church."); *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D. 1991) ("tort claims for behavior by a cleric that does not require the examination of religious doctrine are cognizable."); *Winkler v. Rocky Mountain Conference*, 923 P.2d 152, 157 (Colo. App. 1995) (Where church did not contend that pastor's inappropriate touching of parishioners was based on any religious tenet or belief, trial court properly rejected church's First Amendment defense); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (minister gave no religious reasons to justify his therapeutic massaging of counselees; both minister and church could be liable); *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp.2d 694, 702 (E.D.N.C. 1999) ("While the Free Exercise clause protects religious beliefs and a church's management of its internal affairs, it does not uniformly sanction all religious conduct, nor does it protect all actions taken within the context of a religious environment.)".

## REASONS FOR DENYING WRIT

### I. PETITIONERS' FIRST REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE IT DEALS WITH FINAL ADJUDICATION, AND MISLEADING BECAUSE MABUS IS NOT ASKING THE TRIAL COURT TO DETERMINE WHETHER ECCLESIASTICAL LAWS HAVE BEEN VIOLATED

Petitioners' first argument in support of granting the writ is premature because it challenges civil courts' right to adjudicate cases that involve theological controversy. In the case at bar, Julie Mabus is nowhere near a final adjudication. Petitioners' first reason actually supports Mabus's argument that review would be more appropriate by this Court when and if the trial court ever returns a final adjudication in this case.

Petitioners misrepresent that Mabus's claims are grounded on alleged violations of ecclesiastical laws and policies. Simply because Father McBride may have been violating an ecclesiastical law at the same time he was violating Mississippi tort law does not immunize him from liability under Mississippi's secular laws. To do so would place religious institutions in a preferred position over secular institutions, a concept foreign to the First Amendment. *See Sanders v. Casa View Baptist Church,* 134 F.3d 331, 336 (5th Cir. 1998), *cert. denied sub nom. Baucum v. Sanders,* 525 U.S. 868 (1998); *Malicki v. Doe,* ___ So.2d ___, 2002 WL 390021 (Fla. 2002); *Smith v. O'Connell,* 986 F. Supp. 73, 80 (D.R.I. 1997) (citing *City of Boerne v. Flores,* 521 U.S. 507, 537 (1997) (Stevens, J., concurring)); *Smith v. Raleigh Dist.,* 63 F. Supp.2d 694, 716 n.18 (E.D.N.C. 1999). Petitioners' position is tantamount to saying, if the priest

commits murder, he would be shielded from state criminal law proceedings because he was simultaneously violating one of the Ten Commandments, which is a religious doctrine prohibited from interpretation by the courts.

Petitioners cite several cases holding that the civil courts should not be allowed to resolve church property disputes (Petition, page 10) and claim that if civil courts cannot hear these cases, then Mabus's case should certainly not be heard. The Florida Supreme Court addressed that precise issue in the *Malicki* opinion released two weeks ago. In *Malicki*, the Florida Supreme Court noted that this Court has not extended the religious autonomy principle as articulated in the property dispute cases cited by Petitioners to any disputes beyond strictly ecclesiastical intrachurch disputes that have been resolved through an ecclesiastical tribunal. The Florida Supreme Court then held that negligent hiring and supervision claims would not be barred by the Free Exercise Clause, stating:

> . . . the imposition of tort liability in this case has a secular purpose and the primary effect of imposing tort liability based on the allegations of the complaint neither advances nor inhibits religion. The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee "excessive" entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law.

*Malicki*, ___ So.2d at ___, 2002 W.L. 390021 *10 (Fla. 2002).

## II. PETITIONERS' SECOND REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE MERELY ALLOWING DISCOVERY INTO THE FACTS DOES NOT IMPOSE ANY SPECIAL DUTIES ON PETITIONERS

The state courts have not imposed any duties on Petitioners. Should there be an ultimate adjudication of liability on the issue of breach of fiduciary duty, then Petitioners may wish to raise this argument. Now, the only ruling of the trial judge is that discovery can commence and the case will not be dismissed on the face of its pleadings. (Petition, App. 1) The trial judge may ultimately rule that Father McBride had no special relationship of trust with Julie Mabus and therefore he owed her no duty. The jury may also come to this conclusion due to the fact that in Mississippi the question of whether or not a fiduciary duty existed is a factual one and ordinarily cannot be decided on a motion to dismiss.[2] It is Mabus's contention that the facts would support a jury's determining that the relationship between Rev. McBride and Julie Mabus was a fiduciary one. At the very least, this is a question for the jury. *See, e.g., Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1176 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998), *cert. denied sub nom. Baucum v. Sanders*, 525 U.S. 868 (1998) (court held that question of whether there was a fiduciary relationship between minister and parishioners was a genuine issue of material fact to be determined at trial).

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[2] *Braidfoot v. William Carey College*, 793 So.2d 642 (Miss. App. 2000); *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 150 (Miss. 1998); *Merchants and Planters Bank of Raymond v. Williamson*, 691 So.2d 398 (Miss. 1997); *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79 (Miss. 1991).

Petitioner cannot credibly argue that the duty to respond to discovery is a "special" duty placed on the Petitioners merely because of their religious status. All litigants face the task of participating in discovery. Petitioners are not being singled out or treated any differently than any other litigant would be treated. Petitioners are also able to avail themselves of all protective measures available under the Mississippi Rules of Civil Procedure should any discovery request prove unduly burdensome or harassing in nature.

## III. PETITIONERS' THIRD REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE MISSISSIPPI'S HIGHEST COURT HAS NOT YET DECIDED THE ISSUES THAT ARE IN CONFLICT ACROSS THE COUNTRY

The Chief Justice of the Mississippi Supreme Court concedes that the issues presented to this Court have not yet been determined in Mississippi. (Petition, App. 10) The fact that states differ in their interpretation of state tort laws as they are applied to clergy is even more reason why Mississippi should be allowed to forge her own body of law on the subject before this Court steps in. Asking this Court to rule now, before there has been an adjudication of liability and before the Mississippi Supreme Court has had the opportunity to consider the issues on the merits, is putting the cart before the horse.

Interestingly, Petitioners cite lengthy verbatim quotes from the case of *Ayon v. Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998) as the best example of the reasoning of the States that hold the First Amendment forecloses negligent

hiring, supervision and retention claims. When the First Amendment issues in *Ayon* were appealed up to the Tenth Circuit Court of Appeals, the appellate court refused to consider them and instead found in favor of the church on completely separate state law claims involving the statute of limitations. *Ayon v. Gourley*, 185 F.3d 873 (10th Cir. 1999) (unpublished decision). This history of *Ayon* provides a perfect example of why this Court should refrain from granting certiorari until all the avenues of appeal have been exhausted in Mississippi.

## IV. PETITIONERS' FOURTH REASON IN SUPPORT OF A WRIT OF CERTIORARI FAILS TO SHOW IRREPARABLE HARM IF THE PETITIONERS ARE MERELY REQUIRED TO COMPLETE DISCOVERY.

Petitioners argue that they will face irreparable harm if they are required to submit to the process of discovery. Petitioners failed to cite any authority for the proposition that the Religion Clauses protect clergy and/or religious organizations from participating in discovery. Instead, they rely on several cases involving freedom of speech. (Petition, page 21)

Petitioners speculate that the mere fact they must attend depositions and respond to written discovery will chill their ability to practice their religion. Petitioners make no credible argument to this Court that Julie Mabus's requests will have such a chilling effect. Moreover, discovery rules enable Petitioners to object to certain inquiries, at which time the trial judge may consider

arguments from all parties and make a full and complete record on the issue.

Julie Mabus seeks to discover only facts regarding what the diocese knew about Father McBride's actions, when they knew about them, and what steps they took to avoid further harm after they learned of the acts. Julie Mabus is not seeking to inquire into religious "truths" about the Episcopal faith or religious beliefs held by the deponents. These defendants should not be allowed to stand above the laws that govern our society and use the First Amendment to shield them from accepting responsibility for tortious acts that harm others.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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**EXHIBIT A**

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

JULIE MABUS — PLAINTIFF

VERSUS — NO. 251-01-023

ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10 — DEFENDANTS

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE MOTION TO DISMISS OF THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE L. BRELAND HILBURN, CIRCUIT COURT JUDGE, ON THE 15TH DAY OF AUGUST, 2001.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

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* * *

RULING

[56] and a violation of that fiduciary duty by the defendants.

The Court recognizes that although it's characterized as a rule of evidence, there is statutory authority for the enforcement of a confidentiality of priest penitent conversations, and based upon the face of the pleadings, it's the finding of the Court that the motion to dismiss will be overruled.

I understand that there are summary judgment motions which would certainly be more particular in drawing a fine line in the evidence concerning, in particular, the fiduciary relationship that is set forth in the complaint.

I think at the time that those summary judgment motions are scheduled you will need to be prepared

to – well, I would prefer not to hear all of the summary judgment motions at one sitting if they're going to take an extensive period of time. I don't know how long you think your argument is going to be and whether they are going to take different courses from the defendants.

I'm just trying to think of whether we need any type of scheduling order.

BY MR. ROSS: Your Honor, could I

* * *

(3)

No. 01-1263

Supreme Court, U.S.
FILED
APR 12 2002

In The

# Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF MISSISSIPPI, ST. JAMES CHURCH, AND JERRY MCBRIDE,

*Petitioners,*

v.

JULIE MABUS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Hinds County Circuit Court Of Mississippi, First Judicial District**

## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, The Protestant Episcopal Church in the Dioceses of Mississippi (individually referred to as "Diocese"), St. James Church (individually referred to as "Church"), and Jerry McBride (individually referred to as "McBride"), submit this Reply in Further Support of their Petition for Writ of Certiorari to the Hinds County Circuit Court of Mississippi, First Judicial District.

## I. JURISDICTION

Respondent challenges this Court's jurisdiction by asserting that the orders below do not constitute a final judgment. Respondent is incorrect. Respondent's position is inconsistent with this Court's interpretation of the finality provisions of 28 U.S.C. § 1257 as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[1] When a

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[1] This Court recognizes four categories in which review by this Court is allowed despite further proceedings pending in the courts below. Those categories are as follows:

> (1) there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.
>
> (2) the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings.
>
> (3) the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.

lower court decision irreparably impairs First Amendment rights, the decision is final as to those rights, even if further proceedings may take place in the lower court. *See Fort Wayne Books, Inc. v. Indiana, et al.*, 489 U.S. 46, 55 (1989); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977) (*per curium*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-247 (1974).

Ms. Mabus' Complaint makes clear that she seeks to impose liability on these Petitioners *exclusively* because of their religious status and affiliation. (App. at 14-24) No other basis for her claims is stated in her Complaint, and Ms. Mabus has admitted that she would have no cause of action absent the religious status of these Petitioners. (App. at 25-27) By denying the Petitioners' Motion to Dismiss, as Revised, and by denying interlocutory review of that order, the courts below finally and conclusively

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> (4) the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *see, e.g., Florida v. Thomas*, 532 U.S. 774 (2001).

determined that civil liability can be based exclusively upon religious status and/or affiliation.

Through these decisions, the courts below also finally and conclusively determined that Petitioners would be subject to the discovery process in this matter, which encroaches upon the First Amendment rights of these Petitioners. The decisions of the courts below allow Respondent to probe into the canons, doctrines, polity, beliefs, and practices of these Petitioners without restraint.[2] The very process of discovery and a trial in this matter, regardless of the ultimate outcome, will cause a direct violation of the First Amendment rights that cannot be remedied through the appellate process.[3] It is well recognized by this Court that First Amendment rights can be irreparably harmed through the very process of discovery. *See National Assoc. for Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1959) (holding that compelling disclosure of members and agents was a violation of First Amendment rights to association). Compelling religious figures to provide testimony as to their

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[2] Ms. Mabus has made clear her intend to build her case by deposing the bishop and several priests of the church and the Dioceses, and probing into the canons, doctrines, polity, beliefs, and practices. (App. at 28-30) Furthermore, Ms. Mabus has clearly stated her intent to put on evidence in a court of law as to those canons, doctrines, polity, and beliefs through "experts." (App. at 26) As is fully set forth in the Petition, the final and conclusive impact of the lower courts' rulings was expressed by the Chief Justice of the Mississippi Supreme Court, Justice Pittman, in the Separate Statement on Order. (App. at 9-10)

[3] The fact that the actual imposition of civil liabilities for the claims asserted and pursued by Ms. Mabus would simply be another First Amendment violation, above and beyond the process itself.

beliefs, their canons, and their practices (which do not violate any duty generally applicable to other persons) intrudes upon these Petitioners' free exercise rights and excessively entangles the courts with religion. Requiring such testimony itself is harm that cannot be repaired at a later date.

More fundamentally, regardless of the outcome, the state court in Mississippi will decide the proper role for priests in activities not actionable against other persons. Such amounts to state regulation of religion. Ms. Mabus, thus, is incorrect in her argument that it is possible that the trial judge or a jury could find in favor of the Petitioners without ever reaching the federal issue, because by the time this occurs, the federal rights associated with this federal issue will be destroyed.

In a related argument, Ms. Mabus asserts that if Petitioners prevail on their motion for summary judgment, the First Amendment will likewise be moot. Such is simply not the case. On April 2, 2002, the Mississippi Supreme Court entered an order staying all state court proceedings pending this Court's decision on certiorari. (A copy of this order is included in the Appendix to this Reply) Prior to the entry of the stay order, counsel for Ms. Mabus refused to respond to Petitioners' request for summary judgment absent further discovery, including the deposition of several priests and the Bishop. Furthermore, Petitioners' motion for summary judgment only addresses some of the claims alleged in Ms. Mabus' Complaint, while Petitioners' First Amendment defense is applicable and dispositive as to all of Ms. Mabus' claims.

In sum, despite the fact that further proceedings remain in this case, the issues related to the First Amendment rights of these Petitioners have been finally and

conclusively determined. Given the federal policy involved and the irreparable harm that will occur if the First Amendment issues are not addressed by this Court, this Court possesses the appropriate jurisdiction to hear the federal issues presented in the Petition for Writ of Certiorari.

## II. RESPONDENT'S COMPLAINT DOES NOT SEEK TO IMPOSE GENERALLY APPLICABLE TORT LAW

Respondent asserts throughout her opposition that Respondent is not alleging that Petitioners owe a special duty to Respondent and that she only seeks to impose general Mississippi civil law tort liability. In making this argument, Ms. Mabus ignores her own pleadings and the representations made by her counsel in prior statements on the record. Ms. Mabus' Complaint is replete with assertions that religious affiliation creates special legal duties. Examples of such assertions are set forth in footnote 2 of the Petition and will not be repeated herein. Ms. Mabus cannot now deny the words of her own Complaint.[4] Likewise, the explicit concession of Ms. Mabus,

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[4] The courts below, and this Court, are bound by the allegations of the Complaint and are not free to speculate that the Plaintiff "might" be able to state a claim if given an opportunity to redraft her complaint. *See, e.g., Minor v. Engineering Service Co., Inc.*, 304 So. 2d 45 (Miss. 1974); *Sinclair Refining Co. v. Tompkins*, 117 F.2d 596 (5th Cir. 1941); *Macias v. Raul*, 23 F.3d 94, 97 (5th Cir. 1994); 5 A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1368 (2d ed. 1990); *Henthorn v. Department of Navy*, 29 F.3d 682, 687-88 (D.C. Cir. 1994). Petitioners are entitled to know, from the complaint, what plaintiff is claiming so they can adequately respond and defend. *See, e.g., Estate of Stevens v. Wetzel*, 762 So. 2d 293 (Miss.

through her counsel, that no cause of action exists absent Father McBride's status as a priest, is set forth in footnote 1 of the Petition.

Respondent asserts that Petitioners' case is identical to a hypothetical case where a priest commits murder and then seeks First Amendment protection from state criminal law proceedings because the act was simultaneously a violation of The Ten Commandments. (Opposition Brief at 7-8) Respondent further argues that the issue presented in this case is the same as that presented in the recent Florida Supreme Court Decision of *Malicki v. Doe*, ___ So. 2d ___, 2002 W.L. 390021 (Fl. 2002). Respondent's assertion and reliance upon cases like *Malicki* demonstrate her flawed reasoning. Murder is a crime generally applicable to all. Likewise, the *Malicki* case concerns a member of the clergy who "fondled, molested, touched, abused and sexually assaulted and/or battered" a minor child. All of these activities constitute tortious (and criminal) conduct, which give rise to a cause of action based upon civil law against all persons, clergy or non clergy. No reliance on religious status is necessary to make these activities tortious. As explained fully in the Petition, this is not the situation in the case *sub judice*.[5]

To emphasize, Petitioners herein are *not* seeking an exemption from civil law duties generally applicable to

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2000); *New York Indem. Co. v. Myers*, 138 So. 334 (Miss. 1931); *General Star Idem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999).

[5] Under Mississippi law, the act of secretly recording a conversation without another's consent or not disclosing that someone else is taping a conversation, is neither unlawful nor tortious, *see Attorney M. v. The Mississippi Bar*, 621 So. 2d 220 (Miss. 1992), a point which Respondent concedes.

all persons. Petitioners only seek protection from being the target of civil liability based *solely* upon religious status.

## III. ADJUDICATION OF RESPONDENT'S COMPLAINT REQUIRES ENTANGLEMENT IN ECCLESIASTICAL MATTERS OUTSIDE THE JURISDICTION OF CIVIL COURTS

Respondent also argues throughout her opposition that she is not alleging a violation of an ecclesiastical law and that no interpretation of ecclesiastical doctrines or beliefs will be necessary to adjudicate this matter. Again, Respondent ignores her pleadings and the prior, on-the-record representation of her counsel.

The Complaint states as follows:

> St. James and Diocese knew or should have known that Father Jerry McBride could not be trusted to follow the Cannons (sic) of the Episcopal religion and maintain the confidence and/or trust of parishioners.

(App. at 21) Likewise, Respondent asserts,

> St. James and Diocese . . . failed to take appropriate steps to supervise Father McBride's interaction with parishioners and they continued to enable his service as a spiritual leader of St. James Episcopal Church.

(App. at 21) The only reasonble interpretation of these assertions is that Father McBride violated the Episcopal canons, and that the Diocese and the Church were negligent for not insuring that Father McBride complied with the canons. Likewise, Respondent's Complaint states throughout that Father McBride was acting as a "spiritual leader." (App. at 17-21) Determining if Father McBride violated any duties as a "spiritual leader," necessarily

involves the state probing into the episcopal beliefs and practices to ascertain their scope and limits, or alternatively, the state must impose its own limits on a priest's spiritual authority. Either alternative violates the First Amendment.

Finally, the words of Ms. Mabus' counsel, in the record before the trial court, could not be clearer as to how ecclesiastical matters will be involved. Quoting Ms. Mabus' counsel,

> [W]hether the conduct at issue in this case involves the interpretation of religious doctrine . . . we establish that by calling their witnesses up there and saying, Oh, whether or not to reveal the confidences of a confession, that's purely a church matter, and then *we call experts that get up there, Episcopalian experts that understand and are familiar with their doctrines, and say, well no actually, it's just the opposite.* . . .

(App. at 26) (emphasis added).

## IV. PETITIONERS WILL SUFFER IRREPARABLE HARM

Respondent also argues that there will be no harm in requiring Petitioners to go through discovery and a trial before deciding the First Amendment issues, and thus, the Petition is not ripe for decision. Petitioners have addressed much of this argument in its response to Respondent's jurisdictional challenge and thus will only touch on additional arguments in this section.

The interpretation of ecclesiastical law is outside the scope of the civil court's jurisdiction, *see Watson v. Jones*,

80 U.S. 679, 733 (1871), and will cause the state courts to become excessively entangled with religion. *See Jones v. Wolf*, 433 U.S. 592, 602 (1979). As explained in the Petition, such is a *per se* constitutional violation that cannot be remedied after the fact.

Moreover, allowing these claims to go forward will constitute a *de facto* prior restraint on Petitioners' First Amendment rights by restricting their religious freedom to interpret church doctrine and act in accordance therewith. Prior restraints, by definition, involve "immediate and irreversible sanctions" that freeze First Amendment rights. *Nebraska Press Assn. v. Stewart*, 427 U.S. 539 (1976). While these matters are pending, Petitioners are uncertain whether, as religious persons and institutions, they may determine proper priestly behavior in areas not actionable against ordinary citizens, or whether the courts will do so. Further, any interpretation of their religious doctrine (and practices stemming therefrom) by Petitioners during the pendency of this action may be discoverable and admissible as to the legal standard of care for a priest. Thus, the Diocese and the Church are not free to interpret their religious doctrine and advise their clergy and parishioners in accordance therewith without fear that such interpretation and advice may be used against them in these proceedings or in another action. Their ability to exercise their First Amendment rights has been frozen, or at least significantly chilled, just as in free speech cases involving prior restraints. Thus, this Court should grant certiorari to prevent this irreparable harm.

## CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, this Court has jurisdiction, the questions are accurately presented, and this Court should grant the Writ of Certiorari.

Respectfully submitted,

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Serial: **94856**

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2001-M-01558**

***JULIE MABUS***

*v.*

***ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10***

**ORDER**

(Filed Apr. 2, 2002)

This matter is before the Court, sitting en banc, on the Motion for Stay of Proceedings Pending Certiorari to the United States Supreme Court filed by the Episcopal Diocese of Mississippi, Inc. Also before the Court are the Joinder in the motion to stay filed by St. James episcopal Church and Jerry Mcbride and the Plaintiff's Response in Opposition to Defendant's Motion for Stay of Proceedings filed by Julie Mabus. After due consideration, the Court finds that the motion should be granted and that proceedings in the trial court should be stayed pending a decision on the petition for writ of certiorari presently pending in the United States Supreme Court. The stay will be immediately lifted if the petition for writ of certiorari is denied.

IT IS THEREFORE ORDERED that the Motion for Stay of Proceedings Pending Certiorari to the United States Supreme Court filed by the Episcopal Diocese of Mississippi, Inc., is granted.

SO ORDERED, this the 2nd day of April, 2002.

/s/ James W. Smith, Jr.
JAMES W. SMITH, JR.,
PRESIDING JUSTICE
FOR THE COURT

TO GRANT: PITTMAN, C.J., SMITH, P.J., WALLER, COBB, DIAZ AND CARLSON, JJ.

TO DENY: MCRAE, P.J., AND EASLEY, J.

NOT PARTICIPATING: GRAVES, J.